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confidences and to disclose any material matters infringing upon these obligations.

R. Mallen & J. Smith, *Legal Malpractice* (2006 ed.), §14.1, p. 599. See, also, *Smith v. Mehaffy*, 30 P.3d 727, 733 (Colo. App. 2000).

The Restatement (Third) of the Law Governing Lawyers (hereafter, sometimes, "the Restatement") defines a lawyer's fiduciary duties to the client as the duty to "(3) comply with obligations concerning the client's confidences and property, avoid impermissible conflicting interests, deal honestly with the client, and not employ advantages arising from the client-lawyer relationship in a manner adverse to the client;" *Restatement*, § 16(3). The fiduciary obligations set a standard of *conduct*, as distinguished from a standard of *care*. *Legal Malpractice*, *supra*, § 14.2, pgs. 605-606. A breach of a lawyer's duty of undivided loyalty occurs when the lawyer "obtains a personal advantage in dealing with a client" or when the lawyer "creates circumstances that adversely affect a client's interests." *Smith*, 30 P.3d at 733.

E. LM&B's Conflict of Interest Problems

"[A] lawyer is civilly liable to a client if a lawyer breaches a fiduciary duty owed to a client . . ." *Restatement*, § 49. Implicit in the lawyer's fiduciary duty of loyalty is a duty to remain free of conflicts of interest. *See, e.g., Boyd v. Garvert*, 9 P.3d 1161 (Colo. App. 2000); *Smith*, 30 P.3d at 733. It is my opinion that LM&B had significant unwaivable conflicts of interest, which it did not thoroughly analyze or properly disclose, and, thus, it breached its fiduciary duty to its clients when it undertook to represent its clients in the Dispute Resolution Process against Nextel. It is my opinion that the LM&B lawyers did not seem to have a good grasp on the conflict of interest issues.

1. Conflicts of Interest-Generally

The conflict of interest rules arise out of several policy concerns. The first is the belief that a client has a right to a lawyer who will be loyal to the client and in whom the client can trust. Cmt. a, *Restatement*, § 121, pg. 245; *Restatement* § 128, pg. 338 (2002). The conflict of interest rules seek to promote trust between the client and the lawyer. *Id.*

The second, closely related, policy concern is the interest in enhancing effective legal representation. Cmt. a, *Restatement* § 121, pg. 245. Conflicts of interest undermine a lawyer's independence and professional judgment. *Id.* If a lawyer's professional judgment is influenced by competing personal, financial, or professional concerns, the lawyer may, consciously or unconsciously, fail to provide the client with accurate or complete legal advice.

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The third policy concern is that a lawyer be a client's protector and vigorous advocate. A conflict of interest may deter a lawyer from representing a client with the appropriate vigor. *Id.*

Colorado's general conflicts of interest rule is set out in Rule 1.7 of the Colorado Rules of Professional Conduct:

RULE 1.7 CONFLICT OF INTEREST: GENERAL RULE

- (a) A lawyer shall not represent a client if the representation of that client will be directly adverse to another client, unless:
 - (1) the lawyer reasonably believes the representation will not adversely affect the relationship with the other client; and
 - (2) each client consents after consultation.
- (b) A lawyer shall not represent a client if the representation of that client may be materially limited by the lawyer's responsibilities to another client or to a third person, or by the lawyer's own interests, unless:
 - (1) the lawyer reasonably believes the representation will not be adversely affected; and
 - (2) the client consents after consultation. When representation of multiple clients in a single matter is undertaken, the consultation shall include explanation of the implications of the common representation and the advantages and risks involved.
- (c) For the purposes of this Rule, a client's consent cannot be validly obtained in those instances in which a disinterested lawyer would conclude that the client should not agree to the representation under the circumstances of the particular situation. Colo. RPC 1.7. Paragraph (a) of Colo. RPC 1.7 pertains to a lawyer representing clients with *directly* conflicting or adverse interests, such as representing opposing parties in litigation, negotiations, or business transactions. Cmt. 3, "loyalty to a Client," and Cmts. 8 and 9, "Conflicts in Litigation," Colo. RPC 1.7.

Paragraph (b) of Colo. RPC 1.7 pertains to a lawyer simultaneously representing parties who, while perhaps on the same side of a matter, may have conflicting or divergent interests. Paragraph (b) also refers to possible conflicts with the lawyer's own

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interests or the interests of third parties. Paragraph (b) differs from paragraph (a) in that the *quality* of the lawyer's representation is likely to be limited by competing interests, either other clients' interests or the lawyer's personal interests. Cmt. 17, ABA Model Rule 1.7.

Colo. RPC 1.7(b) applies to conflicts between a lawyer's joint clients in litigation. Cmt. 8, "Conflicts in Litigation," Colo. RPC 1.7. In each case, the question raised by Colo. RPC 1.7(b) is, "Can the lawyer *adequately* represent each client without adversely affecting the material interests of the other clients or the lawyer's interests?"

The *Restatement* tracks the Colo. RPC 1.7(b) and states that a conflict of interest arises when

... there is a substantial risk that the lawyer's representation of the client would be materially and adversely affected by the lawyer's own interests or by the lawyer's duties to another current client, a former client, or a third person.

Restatement § 121, pg. 244-45. Thus, much of conflict of interest analysis involves considering (1) what interest is at stake; (2) what is a "substantial risk;" and (3) what does "materially and adversely affected" mean under the circumstances.

The Comment to the *Restatement* states that "[u]nless there is a risk that the lawyer's representation would be affected 'adversely,' there is no conflict of interest." Cmt. c(I), *Restatement* § 121, pp. 247-48. The standard does not consider an adverse effect *on the client* as determinative of whether there was a prohibited conflict of interest. Rather, the standard addresses an adverse effect *on the lawyer's representation of the client*. The conflict of interest rules do not examine the *result* of the representation, but the *quality* of the representation, regardless of the result. *E.g.*, *In re Cimino*, 3 P.3d 398, 401 (Colo. 2000) ("The absence of injury does not negate the violations of Colo. RPC 1.7(b) or 1.8(a)").

The core principle of all conflict of interest rules is loyalty to the client. The Colorado Supreme Court has stated that a lawyer is required to "maintain a *paramount* duty of loyalty to the client." *People ex rel. Peters v. District Court*, 951 P.2d 926, 929-30 (Colo. 1999) (emphasis added). *See, also*, Cmt. Colo. RPC 1.7; Syllabus, CBA Ethics Comm., Formal Op. No. 57 (March 21, 1981).

Colo. RPC 1.7(b) requires that the lawyer decline a representation that conflicts with the lawyer's personal interest unless (1) the lawyer *reasonably* believes that he or

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she can adequately represent the client, and (2) the client consents after full disclosure. Paragraph (c) adds the “disinterested lawyer” requirement to the client’s informed consent.

In summary, conflicts of interest undermine a client’s *expectation* of effective legal representation and undermine a lawyer’s *ability to provide* effective legal representation. *See Restatement* § 16, p. 146. In this case, LM&B’s conflicts of interest undermined, in striking fashion, both their clients’ expectations of effective legal representation and LM&B’s ability to provide such representation.

2. Potential conflicts vs. actual conflicts

Several of the LM&B lawyers testified that the conflicts of interest were “potential conflicts,” not actual conflicts. I disagree. In my opinion the conflicts were actual, not prospective, conflicts that existed at the time LM&B entered into the DRSA with Nextel. The fact that the lawyers viewed the conflicts as “potential” suggests, in my opinion, that they simply didn’t understand the conflict of interest issues.

3. Review of some of the conflicting interests

LM&B’s lawyers found themselves ensnared in a number of intractable conflicts of interest arising from the DRSA and their conduct during the representation. At least some of the conflicting interests were the following:

a. Conflict with directly adverse clients in litigation

The most obvious conflict of interest is that LM&B was representing one set of clients, the unhappy Nextel employees, in litigation with another client, or, at least, prospective client, Nextel. This problem – caused by the “consultancy” agreement – was a direct conflict of such significance and degree that it could not be waived. Colo. RPC 1.7(c).

It is axiomatic in Colorado that a lawyer may not represent two sets of clients who are directly adverse to each other. *Colo. RPC 1.7(a)*. Each client has an “institutional interest” in the lawyer vigorously representing his or her position when directly aligned against each other. *Cmt 17, ABA Model Rule 1.7; see also, Cmt. 6, ABA Model Rule 1.7*. In Colorado, it has long been the law that lawyers may not represent parties directly aligned against each other in litigation or a transaction. *People v. McDowell*, 718 P.2d 541, 545 (Colo. 1986). In my opinion, LM&B did exactly that.

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Moreover, because of the infirmities in the DRSA discussed on pages 17-18, *supra*, it was not a conflict that a disinterested lawyer would conclude that the client should agree to the representation under the circumstances. And, because LM&B continued the representation despite the rather obvious conflict, it breached its fiduciary duty to its clients and it violated Colo. RPC 1.7(a).

b. Conflict regarding LM&B's future expectations with Nextel

Assuming that there was no client-lawyer relationship between Nextel and LM&B immediately upon signing of the DRSA, there was still a very real conflict of interest for LM&B created by the agreement. The conflict was inherent in the fact that (i) Nextel was going to pay LM&B \$7.5 million in the following three years or so, and (ii) it was contemplated that LM&B would, in the near future, be Nextel's lawyers if it was not then Nextel's lawyer. As such, the DRSA also created a conflict of interest under Colo. RPC 1.7(b), *i.e.*, a conflict regarding a conflict between LM&B's interests and its claimant-clients' interests in vigorously pursuing Nextel. Rule 1.7(b) provides, in pertinent part:

(b) A lawyer shall not represent a client if the representation of that client may be materially limited by the lawyer's responsibilities to another client or to a third person, or by the lawyer's own interests (Emphasis added.)

This situation falls squarely within the prohibitions on conflicts discussed in Rule 1.7(b) and *Restatement* Section 121. Here, LM&B had an interest in keeping Nextel happy; it was due to receive millions of dollars from Nextel. As such, there was an actual conflict of interest between the clients' interest in LM&B's undivided loyalty and LM&B's interests in fostering its relationship with Nextel. It is my opinion that because LM&B continued the representation despite the conflict, it breached its fiduciary duty to its clients and it violated Colo. RPC 1.7(b). And, again, the conflict was not such that a disinterested lawyer would conclude that the clients should agree to the representation under the circumstances. *See, e.g., McCafferty v. Musat*, 817 P.2d 1039, 1044 (Colo. App. 1990).

c. Conflict with the clients' interest in maximizing their recovery

LM&B's clients each had an interest in maximizing their money damages from Nextel and maximizing whatever noneconomic relief to which they were entitled.

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This interest directly conflicted with Nextel's interest in minimizing the money damages paid in settlement or judgments to individual clients and collectively to the group. LM&B appears to have recognized Nextel's goals. *Morelli Depo*, pgs. 53:16 - 54:9. ("One of the things that Nextel hoped to achieve, I guess, is to reduce their exposure somehow.") Thus, to the extent LM&B entered into any agreement with Nextel that limited the clients' ability to maximize their recovery, the clients needed to be fully informed of the benefits, detriments and risks of such an agreement, and have a clear understanding of what they were getting and what they were giving up by such an agreement.

And, indeed, Nextel seems to have masterfully engineered a dispute resolution system that would make it very difficult for individual clients to maximize their recovery. See the discussion on pages 17-18, *supra*.

It may be that it was appropriate for the clients to enter into such an agreement and to give up the right to sue and/or the right to recover punitive damages, etc., in exchange for an expedited and cheaper mediation and arbitration procedure and an increased likelihood of some recovery or other noneconomic relief. While the conflict could be waived, with full disclosure and informed consent, in my opinion, that did not happen here. The disclosures to the clients should have included, at a minimum, disclosures about the following:

- The likely impact on the amount of each client's recovery by using the Dispute Resolution Process instead of litigation;
- The likelihood of recovery on individual claims and remedies, such as punitive damages if the clients chose litigation instead of the Dispute Resolution Process;
- The likely costs and attorneys' fees that each client will incur if they elect to proceed to litigation instead of the Dispute Resolution Process;
- The impact of such an agreement on LM&B's ability to adequately represent hundreds of people in a limited amount of time; and
- The risk to the clients if Nextel did not proceed in good faith and "played hardball" with the clients.

While LM&B may have adequately disclosed this information to their clients in group or individual meetings – there is no written or recorded record of what was

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disclosed – given the complexity of the issues, in my opinion, the standard of care in 2000 would have been to make the disclosures in detail and in writing. In my opinion, LM&B was negligent for not making the disclosures in writing. However, even if a writing was not required, what is clear from the testimony of the LM&B lawyers – as I will discuss below – is that they themselves did not understand the conflict of interest issues. And, as they did not understand the issues, they could not adequately explain the issues to their clients.

Because LM&B didn't adequately disclose the conflict of interest, and did not seem to understand the implications of the DRSA on the representation, it is my opinion that LM&B breached its fiduciary duty by proceeding to represent the Nextel clients against Nextel.

Moreover, it is my opinion that Mr. Leeds and Mr. Morelli were negligent in that they did not step in and ensure that (i) they had fully analyzed and understood the subtle conflict issues and (ii) made sure that their young lawyers fully understood the issues and were able to explain the issues to the clients. I note that the most experienced lawyer handling the Nextel matter, other than Mr. Leeds and Mr. Morelli, was Jeffrey Brown, then about 28 years old with 4 years of practice experience. Mr. Brown apparently took the lead in negotiating with Nextel's lawyers, who were extremely experienced and sophisticated. The young LM&B lawyers were no match.

As such, because Mr. Leeds and Mr. Morelli were not fully engaged in the case and understanding of the conflict issues, they allowed their young lawyers to become ensnared in a process that seems to have been overwhelming, in which they did not fully understand the conflict issues and in which the clients became trapped.

d. Clients' interest in LM&B's zealous advocacy

LM&B's clients each had an interest in putting on as strong of a case as possible against Nextel, given the particular facts of their cases. To that end, they each had an interest in their lawyers spending the time necessary to properly investigate and prepare their case for settlement, mediation or arbitration and they each had an interest in the individual attention and undivided loyalty of their lawyer.

The DRSA imposed a \$50,000 per month *penalty* on LM&B for every month the Dispute Resolution Process exceeded the 45 week time limit for resolving the clients' claims. Thus, the penalty itself created a conflict between LM&B's interest in not having \$50,000 per month deducted from its negotiated fee and the clients' interest in having LM&B spend the time necessary to properly prepare the cases. It is my opinion that the

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penalty provision violated Colo. RPC 1.7(b) because it necessarily affected the quality of the representation that LM&B would be able to provide; it created a conflict between the clients' interest in adequate preparation and zealous advocacy and LM&B's interest in avoiding \$50,000 per month financial penalty and receiving the \$2 million "consultancy" fee. Indeed, the lack of adequate preparation seems to have been a theme in the complaints of Ms. McNeil and Ms. Ashton-Moore, as well as other clients. *See, also, Morelli Aff.*, ¶¶18-31. It also likely caused LM&B to violate Colo. RPC 1.1 Competence. I note that there seems to have been no disclosure, in writing or otherwise, of the \$50,000 per month penalty or of its implications to the clients, and certainly no informed consent by the clients.

To the extent that LM&B owed (or in the future would owe) duties to Nextel by virtue of the "consultancy," LM&B was placed firmly in a conflict between its Nextel employee clients, on the one hand, and its future Nextel corporate client, on the other hand, and its own interests *vis-a-vis* Nextel.

It is my opinion that LM&B's decision to represent the claimants against Nextel despite this conflict caused it to breach its fiduciary duties to the plaintiffs and other clients. Again, in my opinion, this conflict could not be waived.

e. LM&B's interest in having Nextel pay its attorney fees and costs

The clients had an interest in having their attorneys fees paid by Nextel; LM&B had the same interest. If the client filed suit in federal court, asserted federal civil rights claims, and prevailed at trial or through a class-action settlement, they likely would have had their individual attorney fees paid. If they each entered into a contingent fee agreement with LM&B – as did Ms. McNeil and Ms. Ashton-Moore – they would pay their attorney fees through whatever they recovered through settlement or judgment, and would pay no attorney fees if they did not recover.

The central problem is that it appears that Nextel treated the litigation as a zero sum problem. Cf. *Morelli Aff.*, ¶ 12. Nextel appears to have either budgeted an amount of money to resolve the problem with its unhappy employees, or put in place a system where the costs could be controlled. As a practical matter, then, Nextel did not really care who received the money; it could be the employees or their lawyers, and it would not matter to Nextel as long as the costs did not exceed Nextel's budget. And, Nextel's counsel seems to have done a masterful job of forcing this budget upon LM&B and its clients. *See* discussion on pages 17-18, *supra*.

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Nextel's success in manipulating the DRSA to its advantage became apparent in the Amendment No. 2. LM&B was unable to "deliver" 14 clients to Nextel under the Dispute Resolution Process and, so, Nextel felt that it deserved "some type of credit for the expenses and time that would be allocated to them." *Brown Depo.*, pgs. 177:2 - 178:11. When LM&B could not "deliver" 14 people, Nextel immediately assessed – and LM&B immediately agreed to – a penalty that shifted the expense and exposure of litigation by 14 clients from Nextel to LM&B. The agreement reflected by Amendment No. 2 – for which there was no disclosure or consent by the clients – deducted \$280,000, i.e., \$20,000 per client – from LM&B's initial \$2 million fee to be paid immediately by Nextel to LM&B, placed the \$280,000 in an escrow account, and used that escrow account to fund Nextel's costs of defending against claims that might be brought by the 14 clients, and to pay any settlement or judgment to those clients from those funds (with a cap of \$20,000 per client). In effect, then, Nextel shifted to LM&B its costs of defending litigation and compensating its employees for harm caused by Nextel, and LM&B subsidized the costs of litigating against its own clients.

To the extent, that LM&B continued to represent the 14 individuals, it had a conflict of interest because, to the extent it zealously advocated for the 14 people to maximize their recovery, LM&B would work directly against its own financial interests. As the DRSA prohibited LM&B from referring these 14 clients to other counsel or sharing information with them, LM&B was put in the position of abandoning the clients or working directly against LM&B's own interests.

Similarly, in Amendment No. 3, LM&B agreed to reduce its monthly fee for consulting fee from Nextel by \$20,000 per month. *DRSA, Amendment No. 3*, ¶6. The specific reason cited by Nextel for imposing the reduction in the monthly consulting fee was that "[i]n the event that any Claimant brings any proceeding against the Companies, the Companies will have to defend such action." *Id.* The \$20,000 per month reduction was to be retained by Nextel to "defend, settle or satisfy any judgment by a Claimant in any proceeding, . . ." with a cap of \$12,500 per claimant. *Id.* Then, the amendment provides that "[a]t the end of the twenty-four (24) month consultancy period, to the extent the monies retained have not been used by the Companies to pay the cost to defend, settle or satisfy any judgment by a Claimant in any action outside of the DRP, said monies will be paid to LM&B in a lump sum." *Id.* Again, the effect was to take monies to which LM&B was contractually entitled and use those funds to defend and pay claims brought by LM&B's clients, and to cause LM&B to finance its clients' opponent. That is a conflict of interest. Colo. RPC 1.7(b). It is not a conflict of interest that a disinterested lawyer would advise a client to waive, even had there been full disclosure.

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In my opinion, because LM&B agreed to terms in and amendments to the DRSA that placed it in direct conflict with at least some of its clients for a limited fund of money, and then continued to represent those clients, LM&B breached its fiduciary duty to its clients, including Ms. McNeil and Ms. Ashton-Moore. The conflict of interest had the effect of adversely affecting LM&B's clients in a way that far outweighed the clients' interest in an expeditious resolution of their claims or minimizing their personal out-of-pocket litigation expenses and attorneys' fees.

f. Conflicts created by the practice restriction provisions of the DRSA.

It is clear that Nextel's lawyers were attempting to impose restrictions upon LM&B's ability to bring any other claims against the company. *DRSA*, ¶¶ 1(c), 4, 6. It is also clear that they were attempting to avoid ABA Model Rule 5.6's and Colo. RPC 5.6's prohibition on attempts to restrict plaintiffs' lawyers' practices in a settlement agreement. In my opinion, the efforts failed, and the result was that the restriction on practice provisions of the DRSA violated Rule 5.6 (b) and created impermissible conflicts of interest.

The restriction on a lawyer's right to practice creates conflicts between the lawyer and the settling client, the lawyer and non-settling clients, and between the lawyer's current client and any future clients. *Yvette Golan, Restrictive Settlement Agreements: A Critique of Model Rule 5.6(b)*, 33 SW. U. L. REV. 1, 14 (2003).

Over the years, there have been any number of creative attempts to "buy off" plaintiffs' counsel and prevent them from again suing the defendant. ABA Formal Ethics Opinion 93-371 (1993). One ploy sometimes used to avoid the prohibitions of Rule 5.6 is for the defendant to hire the plaintiff's lawyer as a "consultant," as happened in this case. *See, e.g.*, Golan, *supra*, note 4, at 5 (2003). *See, also*, Marcy Glenn, *Settlement Ethics*, 30 Colo. Law. 53, 54 (2001); Patrick Longan, 52 Mercer Law. Rev. 807, 820 (2001). In the Oregon case referred to by Professor Simon, *In re Conduct of Brandt*, 10 P.3d 906 (Or. 2000), the Oregon Supreme Court found that while the Code of Professional Responsibility DR 2-108(B) does not prohibit all agreements that restrict the practice of law, it does prohibit such agreements made in connection with settling a case. 10 P.3d, at 918.

The combination of factors in the DRSA, including prohibitions on taking on new clients, referring clients to other lawyers, the requirement that documents be destroyed and the consultancy agreement combined to violate Colo. RPC 5.6 and create conflicts of interest for LM&B.

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Moreover, the DRSA has the added flaw of prohibiting a client from discharging his or her lawyer. *Individual Agreement*, ¶1 ("I agree that LM&B shall be my legal representative throughout the dispute resolution process."). The Colorado Supreme Court has clearly held that any agreement that limits a client's ability to discharge the lawyer is contrary to public policy and unforceable. *Olsen and Brown v City of Englewood*, 889 P.2d 673, 676-77 (Colo. 1995).

While I do not think that the practice restrictions directly caused the plaintiffs harm, the restrictions were part of an overall effort by Nextel to co-opt and control the plaintiffs' lawyers and to minimize its exposure in the litigation; it was that control caused the plaintiffs harm. In my opinion, LM&B was negligent for agreeing to such restrictions. In my opinion, LM&B also violated Colo. RPC 5.6(b).

g. Clients' interest in maximizing their share of a finite resource

In September 2001, LM&B entered Amendment No. 3. Apparently, by late August 2001, it was clear that the parties were having difficulty processing the claims in the time allotted: only 200 of LM&B's clients had completed the Dispute Resolution Process, and 369 remained to go through the process. *Exhibit 1, Amendment No. 3.*, pgs. 1-2; *Morrelli Aff.*, ¶¶18-31. The Amendment No. 3 provided for a finite fund of \$3,690,000, i.e., \$10,000 per remaining client, for settlement of all remaining claims. *Exhibit 1, Amendment No. 3.* LM&B was to approach each of its clients, see what amount it could persuade the clients to take, fill in the number – with a cap of \$25,000 for any single client – and then send the signed release to Nextel, who would deduct the settlement amount from the \$3,690,000 fund and send the money to the client. For each client that chose to continue through the Dispute Resolution Process, the settlement fund would be reduced by \$10,000. If LM&B was unable to muster 354 clients for this process, then Nextel, at its option, could reject the releases that were completed and signed and those clients would have to return to the Dispute Resolution Process. *Id.*

This Amendment created significant unwaivable conflict of interests for LM&B. LM&B was placed in a position of then advocating to its individual clients that the client abandon the Dispute Resolution Process, but accept something less than \$25,000. Thus, rather than advocating to *maximize* each client's recovery, LM&B was arguing with their individual clients to *minimize* each client's recovery. The more one client received, the less money there would be for the others. Moreover, any client who refused to participate in the alternative process would reduce the total settlement fund by \$10,000, thus, further decreasing the fund for other clients. *See* Colo. RPC 1.8(g).

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While the alternative process would have likely speeded up processing clients' claims, it was at the expense of zealous advocacy and a forum in which the clients' complaints about racial discrimination could be heard. The main beneficiaries of the process appear to have been Nextel – the process, if LM&B could persuade most or all of its clients to participate, would effectively cap Nextel's exposure – and LM&B, which appears to have been overwhelmed by the work of preparing each of the clients' cases and was facing a \$50,000 per month penalty if it exceeded the 45 week deadline for processing all of the clients' cases.

Apparently, there was no prior disclosure to the clients of *any* nature about Amendment No. 3 and, thus, certainly no informed consent. In my opinion, the Amendment No. 3, by its terms, was an egregious betrayal of trust by LM&B.

LM&B seemed to be taking the position in depositions that Amendment No. 3 didn't matter because LM&B could not muster the minimum 354 clients willing to use the alternative deadlines. *Morrelli Aff.*, 31. Whether or not LM&B had a prohibited conflict of interest is not determined by the *result* of the representation, but the *quality* of the representation, regardless of the result. *E.g., In re Cimino*, 3 P.3d 398, 401 (Colo. 2000). Moreover, my understanding is that LM&B made a effort to obtain the necessary signatures.

Again, these were not conflicts that a disinterested lawyer would advise a client to waive. Colo. RPC 1.7(c); 1.8(a). While I do not have facts to determine whether any direct harm flowed to the plaintiffs from the particular conflict, it is my opinion that LM&B breached its fiduciary duty of loyalty to the plaintiffs by agreeing to and attempting to implement Amendment No. 3.

6. Interests of Ms. McNeil and Ms. Ashton-Moore

In addition to the interests outlined above, Ms. McNeil and Ms. Ashton-Moore had an interest in their lawyers' adequate representation and adequate compensation from Nextel, as discussed above. If they were, in fact, promised bonuses for recruiting groups of employees from other large companies to LM&B, then they had an interest in receiving those bonuses from LM&B. To the extent that Ms. McNeil developed a mental illness, she had an interest in having her lawyers understand and accommodate her condition.

It is not my opinion that a lawyer should never represent his or her employee. But, the representation does create some risks. The effect of hiring two clients and paying their salary to work on their case created conflicts of interest that, eventually, negatively affected both Ms. McNeil and Ms. Ashton-Moore, on the one hand, and

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LM&B on the other. *Morelli Depo.*, pgs. 31:23 - 34:5. LM&B had an interest in disciplining and maintaining the quality of their employees' work product. *Morelli Depo.*, pgs. 26:6 -28:7; 29:7 - 30:4. Hiring the two lead clients as employees made it more difficult for LM&B to achieve that discipline and quality. It may also have inhibited LM&B's professional independence and ability to provide objective advice, and it created the possibility that members of the firm might become witnesses in the case. *Morelli Depo.*, pgs 31:23 - 34:5.

And as if LM&B now appears to claim, Ms. McNeil and Ms. Ashton-Moore disclosed confidential information to third parties or generally did not do their jobs, then other clients' interests might have been compromised as well. (I have no opinion about whether or not Ms. McNeil or Ms. Ashton-Moore breached any confidentiality obligations or negatively affected any other client's case).

7. Prohibited Transactions

In my opinion, LM&B violated Colo.RPC 1.8 (a) and (f). It entered into a transaction with clients the DRSA the terms to which were not fair and reasonable to, at least, the claimants. Colo. RCP 1.8(a)(1). LM&B also violated Rule 1.8(f) because it accepted compensation from a person other than the claimants –Nextel– but did so in a manner that interfered with their independence of professional judgment and with the client-lawyer relationship. Colo. RCP 1.8(f)(2). The resulting conflicts caused LM&B to breach its fiduciary duty.

F. Adequacy of the Disclosures of the Conflicts of Interest

1. Law and ethics requirements of disclosure of conflicts of interest

Colo. RPC 1.7 generally permits clients to consent to a lawyer's representation with conflicts of interest when "each client consents after consultation." Colo. RPC 1.7(a)(2); *see also* Colo. RPC 1.7(b)(2); Colo. RPC 1.8(a), (f). This exception raises the issue of what constitutes "consent" and what constitutes "consultation"?

The Comment to Colo. RPC 1.7 describes "consultation" as "consultation which involves full disclosure of the possible effect of such dual representation on the exercises of the lawyer's independent professional judgment on behalf of each client." Cmt. 6, "Consultation and Consent," Colo. RPC 1.7. Thus, the current Colorado rule requires the lawyer to consider the following when consulting with the client about the conflict of interest: (1) the possible effect of the conflict of interest on the lawyer's independent

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professional judgment; (2) the possible effect on each affected client; and (3) full disclosure to each effected client. *Id.* See also, the new ABA Model Rules (effective 2002), Rule 1.0(e) (defining "informed consent").

The *Restatement* also discusses the nature of the disclosures necessary to obtain an informed consent from the client as "reasonably adequate information about the material risks of such representation to that client or former client." *Restatement* § 122. See also, Cmt. c(i), *Restatement* § 122, pp. 266-68. The lawyer is responsible for ensuring that each client has the necessary information to make a fully informed consent to a conflict of interest. *Id.* A lawyer who does not personally inform the client assumes the risk that the client is inadequately informed and that the consent is invalid. *Id.*

2. Was there adequate disclosure of the conflicts of interests and the consequences of the conflicts in this case?

It is my opinion that there was woefully inadequate disclosure of the conflicts of interests in this case and of the material risks that the conflicts posed to the client because of LM&B's negotiation and participation in the DRSA.

Assuming the truth of everything that LM&B lawyers have stated about their disclosures to their clients, including Ms. McNeil and Ms. Ashton-Moore, about the conflicts of interest and the payments to be received from Nextel, it is my opinion that the disclosures were woefully inadequate and did not remotely comply with their fiduciary obligations to their clients.

First, the disclosures of the \$5.5 million dollar fee and the \$2 million dollar consultancy fee should have been made in writing in, at least, the Highlights.

Second, the DRSA is a 29 page legal document, not including amendments and schedules. If the document was provided to clients in groups or private meetings (and my understanding is that LM&B lawyers were extremely busy and pushed for time in conducting the meetings), it was unrealistic to expect the clients – most of whom were likely legally unsophisticated – to read and comprehend a complex document and ask appropriate questions and understand the implications.

Third, I have seen little evidence that the LM&B lawyers themselves really comprehended the extent of their conflicts of interest and the extent to which the conflicts of interest could adversely affect their representation of the clients. See, e.g., *Vagnani Depo.*, pg. 10:5 - 15:5. They seemed to strongly believe that the conflicts were "potential conflicts" rather than actual conflicts. *Fitzgerald Depo.*, pg. 23:3-8; See, e.g., *Vagnani*

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Depo., pg. 11:7 - 13:2; 55:4 - 61:21. They seemed to have convinced themselves that, for example, the consultancy arrangement "had no bearing on the representation that [the clients] would be given or professional ability to render judgment in their case."

Fitzgerald Depo., pg. 27:4-18; *Vagnani Depo.*, pg. 58:17 - 59:20. They could not possibly adequately advise their clients about their conflicts of interest when they themselves did not understand the conflicting interests and the potential harm to their clients. And, discussed *above*, the young lawyers seemed to have been given little guidance from Mr. Leeds and Mr. Morelli.

Finally, other than the footnotes in the October 5, 2001, letter, *Exh. 69*, as discussed above, LM&B appears to have made no disclosure to the clients of the Amendment No. 2 and Amendment No. 3, which exacerbated the firm's significant conflict of interest problems.

G. Could the Conflicts of Interest Be Waived?

It is my opinion that LM&B's conflicts of interest were such that they could not be waived and the attempted waiver was ineffective.

1. Rules regarding waiver of conflicts of interest

A lawyer may obtain an effective consent to a conflict of interest only if *each* affected client is fully informed of the possible adverse consequences of the conflict, and *each* client agrees. Even then, under some circumstances the client's consent may be ineffective.

Both Colo. RPC 1.7(a) and (b) provide exceptions to the general rule prohibiting a lawyer from representing clients with conflicting interests. The exceptions have nearly identical requirements. Colo. RPC 1.7(a) provides an exception as follows:

- (a) A lawyer shall not represent a client if the representation of that client will be directly adverse to another client, unless:
 - (1) the lawyer reasonably believes the representation will not adversely affect the relationship with the other client; and
 - (2) each client consents after consultation. (emphasis added).

Colo. RPC 1.7(a). There are three elements to the exception: first, the lawyer must "reasonably believe" that the representation will not "adversely affect" the relationship with the

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other client; second, each affected client must be consulted about the conflict; and third, each affected client must consent to the conflict. Colo. RPC 1.7(b) has a similar exception.

Although it might appear, then, that any conflict might be properly waived, Colorado's Rule 1.7 also includes a provision that was part of the comment to the former ABA Model Rule. This provision is now section (c) of Colorado's Rule 1.7:

- (c) For purposes of this Rule, a client's consent cannot be validly obtained in those instances in which a disinterested lawyer would conclude that the client should not agree to the representation under circumstances of the particular situation. (Emphasis added.)

Colo. RPC 1.7(c). *See, also Restatement, § 122(2)(c).*

There are some conflicts that simply cannot be waived. Under the circumstances in this case, LM&B could not "reasonably believe" that the DRSA, as structured, and the payment from Nextel would not adversely affect their representation of their clients. And, a disinterested lawyer would not advise his or her clients to waive the conflicts.

V. REVIEW OF DEFENDANTS' EXPERT OPINIONS

After substantially completing my written opinion, above, I reviewed the summaries of the opinions and supplemental opinions of Professor Roy Simon, Professor Bruce Green, Jean Dubofsky, and Sheila Meer. I do not have an opinion on the matters discussed in Ms. Meer's letter. As to the opinions of the other expert witnesses, I respectfully disagree for the reasons discussed above.

VI. CONCLUSION

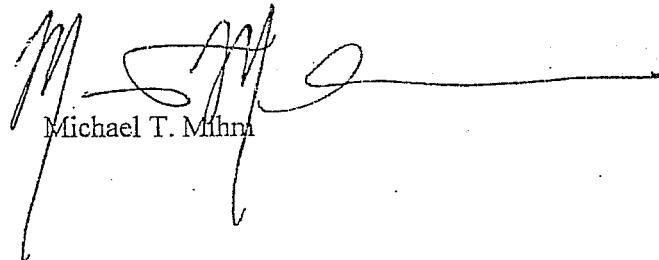
These are my preliminary opinions based upon the documents provided to me to date. I hold my opinions within a reasonable degree of probability. I reserve the right to modify or supplement my opinions as additional information becomes available. Please let me know if you would like me to elaborate or supplement any of the opinions I have discussed above.

I have charged my standard hourly rate of \$335 per hour, and my associates and staff who provided assistance have billed at their standard hourly rates.

Paul Gordon, Esq.
January 19, 2007
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Very truly yours,

STARRS MIHM & CASCHETTE LLP



A handwritten signature in black ink, appearing to read "MTM" followed by a stylized "MTM".

Michael T. Mihm

MTM/mtm

ADDENDUM A

INDEX
EXPERT REPORT

FILED Document
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Denise McNeil, et al., v. Leeds, Morelli & Brown, P.C., et al. at Daphney Teewa
Case No. 2003-CV-893, District Court, City and County of Denver, Colorado

DATE	DOCUMENT	EXHIBIT / BATES
09/30/03	Affidavit of Steven Morelli, Esq.	Plaintiff's Exhibit 5; RICH 06091-06099
04/09/01	Letter from Gregory I. Rasin of Jackson Lewis Schnitzler & Krupman to Jeffrey K. Brown of Leeds Morelli & Brown, P.C. regarding Nextel Claimant: Denise McNeil, State: Colorado	Plaintiff's Exhibit 89; RICH 03849-03851; 345-3580-345-3582
03/24/00	Letter from Lisa M. Calvacca of Leeds Morelli & Brown, P.C. to "Nextel Client"	Plaintiff's Exhibit 88; RICH 06829
10/11/02	Letter from R. Daniel Scheid of Bostrom Sands Sander & Scheid to Andrew W. Loewi of Brownstein Hyatt & Farber, P.C. and Michael T. McConnell of McConnell Siderius Fleischner Houghtaling & Craigmire, LLC	Plaintiff's Exhibit 20; RICH 06847-06865
Undated	Highlights of Settlement Agreement with Nextel	Plaintiff's Exhibit 8; RICH 05262-05263-C; 020-2264-020-2268
02/20/01	Letter from Susan M. Fitzgerald of Leeds Morelli & Brown, P.C. to "Nextel Client" regarding Nextel Dispute Resolution Process	Plaintiff's Exhibit 66; RICH 06165-06167
10/05/01	Letter from Susan M. Fitzgerald of Leeds Morelli & Brown, P.C. to Alencia Ashton Moore regarding Nextel Dispute Resolution Process	Plaintiff's Exhibit 69; RICH 05265-052671 PL 0430-0432
07/13/00	Letter from James A. Vagnini of Leeds Morelli & Brown, P.C. to "Nextel Client"	Plaintiff's Exhibit 24; RICH 04675-04677; PL 0076-0078
04/09/01	Letter from Gregory I. Rasin of Jackson Lewis Schnitzler & Krupman to Jeffrey K. Brown of Leeds Morelli & Brown, P.C. regarding Nextel Claimant: Alencia Ashton-Moore, State: Colorado	Plaintiff's Exhibit 90; RICH 03841-03845; 020-0430-020-0434
09/14/01	Dispute Resolution And Settlement Agreement - Amendment No. 3 signed by Jeffrey K. Brown of Leeds Morelli & Brown, P.C. and Gregory I. Rasin of Jackson Lewis Schnitzler & Krupman, with attachments	DN-000081-000124

09/28/00	Amendment No. 1 to the Dispute Resolution and Settlement Agreement signed by Lenard Leeds of Leeds Morelli & Brown, P.C., Mary Elizabeth McGarry of Simpson Thacher & Bartlett, and Gregory I. Rasin of Jackson Lewis Schnitzler & Krupinan	DN-000061
Undated	Draft Letters from James A. Vagnini of Leeds Morelli & Brown, P.C. to Ellie Miller of the Equal Employment Opportunity Commission regarding Nextel	DN-000062-000077
02/07/01	Amendment No. 2 to the Dispute Resolution and Settlement Agreement signed by Jeffrey K. Brown of Leeds Morelli & Brown, P.C. and [indecipherable] of Jackson Lewis Schnitzler, & Krupman	CN 000078-000079
09/28/00	Dispute Resolution and Settlement Agreement signed by Lenard Leeds of Leeds Morelli & Brown, P.C., Mary Elizabeth McGarry of Simpson Thacher & Bartlett, and Gregory I. Rasin of Jackson Lewis Schnitzler & Krupman, with attachments	DN000001-000060
11/28/05	Lawyer Defendants' Rule 26(a)(2) Expert Disclosures	
11/28/05	Defendants Leeds, Morelli & Brown, P.C., Lenard Leeds, Steven Morelli, Jeffrey Brown, James Vagnini and Bryan Mazzola's Expert Endorsement Pursuant to C.R.C.P. 26(a)(2)(b)	
11/28/05	Defendants Leeds, Morelli & Brown, P.C., Lenard Leeds, Steven Morelli, Jeffrey Brown, James Vagnini and Bryan Mazzola's Supplemental Summary of Expert Opinions Served Pursuant to C.R.C.P. 26(a)(2)(b)	
11/28/05	Exhibit 4 - Resume of Sheila H. Meer	
11/28/05	Exhibit 1 - Memorandum from Sheila H. Meer to Leeds, Morelli & Brown, P.C. regarding Opening Memo	
11/28/05	Exhibit 1-A - Curriculum Vitae of Roy Simon	
11/28/05	Exhibit 1-B - Testimony in the Last Four Years by Roy Simon	
11/28/05	Exhibit 2-A - Curriculum Vitae of Bruce A. Green	
11/28/05	Exhibit 2-B - Testimony in the Last Four Years by Bruce Green	
11/28/05	Exhibit 3-A - Resume of Jean E. Dubofsky	
11/28/05	Exhibit 3-B - Testimony in the Last Four Years by Jean Dubofsky	

11/23/05	Defendant Nextel Communications, Inc.'s C.R.C.P. 26(a)(2)(B)(I) and (II) Expert Witness Disclosures	
Undated	Unsigned Non-Disclosure Agreement (Denise McNeil)	RICH 05781-05783; 345-3761-345-3763
Undated	Unsigned Demand for Resolution of Claims for Settlement Purposes - Alencia Ashton-Moore v. Nextel Communications, Inc.	Plaintiff's Exhibit B; RICH 02631-02632; 201326-201327
Undated	Unsigned Non-Disclosure Agreement (Alencia Ashton-Moore)	RICH 05778-05779; 020-0165-020-0167
Undated	Unsigned Non-Disclosure Agreement (Gary Brewer)	RICH 05775; 102392
Undated	Page 1 of unsigned Non-Disclosure Agreement between Leeds Morelli & Brown, P.C. and Alencia Ashton-Moore	
02/13/02	General Release - Alencia V. Ashton-Moore	RICH 05770-05773; 201475-201478
02/13/02	Statement from Alencia Ashton-Moore on Leeds Morelli & Brown, P.C. stationary	RICH 05774; 201479
Undated	Highlights of Settlement Agreement with Nextel	RICH 05262-05263-C; 020-2264-020-2268
Undated	Unsigned Demand for Resolution fo Claims for Settlement Purposes - Denise McNeil v. Nextel Communications, Inc.	RICH 02640-02641; 202153-202154
Undated	Unsigned Demand for Resolution fo Claims for Settlement Purposes - Denise McNeil v. Nextel Communications, Inc.	Plaintiff's Exhibit 14; RICH 02642-02643; 202155-202156
Undated	First page of Dispute Resolution and Settlement Agreement	Plaintiff's Exhibit 1; RICH 06782
Undated	Page 2, possibly to Dispute Resolution and Settlement Agreement	Plaintiff's Exhibit 3; RICH 05732
Undated	Page 3 through 29, possibly to Dispute Resolution and Settlement Agreement, with attachments	RICH 06784-06820
	Miscellaneous notes, copies of correspondence regarding claims of discrimination	Plaintiff's Exhibit 2; RICH 04154-04377; other bates out-of-sequence
	Miscellaneous notes, draft letter regarding Nextel v. Holland & Hart employees	Plaintiff's Exhibit 4; JV001-027

02/07/02	Email from Dave Powell to Susan Fitzgerald	Plaintiff's Exhibit 22; RICH 04125; 345-3390
	Draft Statement of Claims	Plaintiff's Exhibit 23; RICH 04660-04662; 101174-101172
09/22/00	Letter from James A. Vagnini of Leeds Morelli & Brown, P.C. to Alencia Ashton Moore regarding Nextel	Plaintiff's Exhibit 25; RICH 05290; 020-2312
10/01/00	Fax Cover Sheet from Denise McNeil to James Vagnini regarding Schedule	Plaintiff's Exhibit 26; RICH 03503; 101194
04/24/01	Unsigned letter from James A. Vagnini to Gregory I. Rasin of Jackson Lewis Schnitzler & Krupman regarding Nextel Claimant: Alencia Ashton-Moore, State: Colorado	Plaintiff's Exhibit 27; RICH 04762-04766; PL0211-0215
05/07/01	Letter from James A. Vagnini to Elise M. Bloom of Jackson Lewis Schnitzler & Krupman regarding Nextel Claimant: [REDACTED] State: Virginia	Plaintiff's Exhibit 28; RICH 04779-04781; PL0217-0219
10/03/01	Email from Denise L. McNeil to Leeds Morelli & Brown regarding "Unprofessional Voice Mail Message"	Plaintiff's Exhibit 29; RICH 04090; 2001162
10/04/01	Letter from James A. Vagnini of Leeds Morelli & Brown to Alencia Ashton Moore regarding Nextel DRP	Plaintiff's Exhibit 30; RICH 05247-05248; 020-0110-020-0111
10/04/01	Letter from James A. Vagnini of Leeds Morelli & Brown to Denise McNeil regarding Nextel DRP	Plaintiff's Exhibit 31; RICH 04805-04806; 345-3539-345-3540
10/16/01	Letter from James A. Vagnini of Leeds Morelli & Brown to Denise McNeil regarding Mediation	Plaintiff's Exhibit 33; RICH 04812-04813; 345-3727-345-3728
10/16/01	Letter from James A. Vagnini of Leeds Morelli & Brown to Alencia Ashton Moore regarding Nextel DRP	Plaintiff's Exhibit 32; RICH 05240-05241; 020-0112-020-0113
12/11/01	Letter from James A. Vagnini of Leeds Morelli & Brown to Alencia Ashton Moore regarding Nextel DRP	Plaintiff's Exhibit 34; RICH 05281-05282; 020-0121-020-0122
12/21/01	Letter from James A. Vagnini of Leeds Morelli & Brown to Denise McNeil regarding Nextel DRP	Plaintiff's Exhibit 35; RICH 06197-06198
12/21/01	Letter from James A. Vagnini of Leeds Morelli & Brown to Alencia Ashton Moore regarding Nextel DRP	Plaintiff's Exhibit 36; RICH 05237-05238; 020-0136-020-0137

02/01/02	Respondent's Witness and Exhibit Lists in <i>Denise McNeil v. Nextel West Corporation</i> , CRP Institute for Dispute Resolution filed by Holland & Hart LLP and Jackson Lewis Schnitzler & Krupman	Plaintiff's Exhibit 37; RICH 0645706459
02/08/02	Letter from James A. Vagnini of Leeds Morelli & Brown to Alencia Ashton Moore regarding Ashton-Moore v. Nextel West Corporation	Plaintiff's Exhibit 38; RICH 05221-05222; 020-0202-020-0206
02/20/02	Letter from James A. Vagnini of Leeds Morelli & Brown to Denise McNeil regarding McNeil v. Nextel West Corporation	Plaintiff's Exhibit 39; RICH 05078-05080
02/20/02	Letter from James A. Vagnini of Leeds Morelli & Brown to Denise McNeil regarding McNeil v. Nextel West Corporation enclosing Subpoena Duces Tecum and Order	Plaintiff's Exhibit 30; RICH 06498-06504
03/04/02	Letter from James A. Vagnini of Leeds Morelli & Brown to Denise McNeil regarding McNeil v. Nextel West Corporation regarding Order from the Arbitrator	Plaintiff's Exhibit 41; RICH 05123-05124; 345-3835-345-3836
03/06/02	Letter from James A. Vagnini of Leeds Morelli & Brown to Denise McNeil regarding McNeil v. Nextel West Corporation regarding settlement	Plaintiff's Exhibit 42; RICH 06545-06546
03/06/02	Letter from James A. Vagnini of Leeds Morelli & Brown to Denise McNeil regarding McNeil v. Nextel West Corporation regarding settlement	Plaintiff's Exhibit 43; RICH 05141-05145; 345-2826-345-2830
03/07/02	Email from Letter from James A. Vagnini to Denise McNeil regarding Settlement Conference	Plaintiff's Exhibit 44; RICH 04141-04142; 201551-201552
03/07/02	Letter from Denise L. McNeil to James A. Vagnini of Leeds Morelli & Brown regarding McNeil v. Nextel West Corporation regarding settlement and payroll	Plaintiff's Exhibit 45; RICH 03532-03534; PL0618-0619; 201542
03/08/02	Letter from James A. Vagnini of Leeds Morelli & Brown to Gregory I. Rasin of Jackson Lewis Schnitzler & Krupman regarding Affidavit in support of Denise McNeil	Plaintiff's Exhibit 46; RICH 05152; 345-3958
03/15/02	Letter from James A. Vagnini of Leeds Morelli & Brown to Denise McNeil regarding McNeil v. Nextel West Corporation regarding Thomas Hickey	Plaintiff's Exhibit 37; RICH 05159
03/17/02	Email from Denise L. McNeil to James A. Vagnini regarding "1099 Request"	Plaintiff's Exhibit 48; RICH 04147-04150
03/18/02	Letter from James A. Vagnini of Leeds Morelli & Brown to Denise McNeil regarding Settlement with Nextel	Plaintiff's Exhibit 49; RICH 05161-05162; 345-3324-345-3325

04/08/02	Email from Jeffrey Brown to Denise L. McNeil regarding "Employment"	Plaintiff's Exhibit 50; RICH 04151; 201565
07/08/02	Memorandum from James to Jeff regarding Denise McNeil	Plaintiff's Exhibit 51; RICH 05168; 345-3951
08/16/02	Letter from James A. Vagnini of Leeds Morelli & Brown to "Past or Present Worldcom Employee" regarding Worldcom Update	Plaintiff's Exhibit 52; RICH 05169-05170
02/05/03	Email from Denise McNeil to James A. Vagnini regarding Taxes	Plaintiff's Exhibit 53; RICH 04152
02/10/03	Email from Denise McNeil to Jeffrey Brown regarding Requesting Documents for Nextel Case	Plaintiff's Exhibit 54; RICH 04153
Undated	Draft Demand for Resolution of Claims for Settlement Purposes - Denise McNeil v. Nextel Communications, Inc.	Plaintiff's Exhibit 55; RICH 02638; 345-2907
Undated	Draft Demand for Resolution of Claims for Settlement Purposes - Alencia Ashton-Moore v. Nextel Communications, Inc.	Plaintiff's Exhibit 56; RICH 02628-02630; 020-0483-020-0485
Undated	Alencia Ashton-Moore - Claims	Plaintiff's Exhibit 57; RICH 02678-02681; 020-0535-020-0538
Undated	Work Product Prepared in Contemplation of Litigation - Alencia Ashton-Moore	Plaintiff's Exhibit 58; RICH 02710-A - 02710-G; 020-1258-020-1264
Undated	Work Product Prepared in Contemplation of Litigation - Denise McNeil	Plaintiff's Exhibit 59; RICH 02856-02865
Undated	Denise McNeil - Claims	Plaintiff's Exhibit 60; RICH 02672-02677
Undated	Email from Bryan Mazzola to M. Bertron regarding Ashton-Moore Depositions	Plaintiff's Exhibit 61; RICH 04121; 020-0240
Undated	Memorandum from Bryan to Susan regarding Unauthorized Practice of Law in Various Jurisdictions	Plaintiff's Exhibit 62; RICH 04648-A - 04648-C
11/21/00	Memorandum from Susan Fitzgerald to Alencia Ashton-Moore and Denise McNeil regarding Statement of Claims	Plaintiff's Exhibit 63; RICH 04710-04711; 101233-101234
11/24/00	Letter from Denise to Susan regarding claimant statements	Plaintiff's Exhibit 64; RICH 04713; PL0126

01/09/01	Email from Alencia Ashton-Moore to Susan Fitzpatrick regarding backup of work	Plaintiff's Exhibit 65; RICH 04069; PL0160
05/08/01	Email from Susan Fitzpatrick to Denise McNeil regarding Missing Claimants	Plaintiff's Exhibit 67; RICH 04081; PL0221
08/16/01	Letter from [REDACTED] to James A. Vagnini and Susan M. Fitzgerald regarding Nextel Dispute Process	Plaintiff's Exhibit 68; RICH 01661; PL0404
01/14/02	Letter from Doris and Gary Brewer to Susan Fitzgerald regarding Clarification of January 9 th and 10 th Talks (Response to January 11 th Letter)	Plaintiff's Exhibit 70; RICH 06310-06311
01/15/02	Letter from Susan Fitzgerald to Denise McNeil regarding Nextel DRP	Plaintiff's Exhibit 71; RICH 06314-06315
01/24/02	Unsigned letter from Susan Fitzgerald to Denise McNeil regarding McNeil v. Nextel West Corporation	Plaintiff's Exhibit 72; RICH 04981-04983; 345-3813-345-3815
01/25/02	Letter from Susan Fitzgerald to Alencia Ashton Moore regarding Nextel DRP	Plaintiff's Exhibit 73; RICH 04991; 020-0192
01/25/02	Letter from Susan Fitzgerald to Alencia Ashton Moore regarding McNeil v. Nextel West Corporation	Plaintiff's Exhibit 74; RICH 04988-04989; 102431-102432
01/31/02	Unsigned Preliminary Statement in <i>Alencia Ashton-Moore v. Nextel West Corporation</i> , CPR Institute for Dispute Resolution	Plaintiff's Exhibit 75; RICH 05583-05604; 201376-201397
01/31/02	Letter from Susan Fitzgerald to Ruth L. Fuller of the University of Colorado Health Sciences Center regarding Denise McNeil	Plaintiff's Exhibit 76; RICH 06380-06381
02/05/02	Letter from Susan Fitzgerald to Alencia Ashton-Moore regarding Ashton-Moore v. Nextel West Corporation	Plaintiff's Exhibit 77; RICH 05225; 020-0195
02/05/02	Email from Susan Fitzgerald to Arbitrator Williams regarding Discovery of Medical Records	Plaintiff's Exhibit 78; RICH 04123-04124; 345-3845-345-3846
02/08/02	Letter from Susan Fitzgerald to Denise McNeil regarding McNeil v. Nextel West Corporation - Arbitrator's Order	Plaintiff's Exhibit 79; RICH 06464-06468
02/20/02	Page 1 of an Email from James Vagnini to Denise McNeil attaching Susan Fitzgerald's letter to Denise McNeil - Arbitrator's Order	Plaintiff's Exhibit 80; RICH 04126; 345-3375

02/22/02	Letter from Susan Fitzgerald to Alencia Ashton-Moore regarding Nextel Communications, Inc. regarding settlement check	Plaintiff's Exhibit 81; RICH 06515-06516
02/22/02	Letter from Susan Fitzgerald to Arbitrator Williams regarding a guardian ad litem for Denise McNeil	Plaintiff's Exhibit 82; RICH 06512-06514
02/27/02	Letter from Denise McNeil to Susan Fitzgerald regarding Fitzgerald's Letter to Mike Williams	Plaintiff's Exhibit 83; RICH 03530-03531; 345-3364-378-3365
02/28/02	Letter from Susan Fitzgerald to Denise McNeil regarding McNeil v. Nextel West Corporation and conference with Arbitrator Williams	Plaintiff's Exhibit 84; RICH 06530-06533
03/01/02	Letter from Susan Fitzgerald to Arbitrator Williams regarding McNeil v. Nextel West Corporation and Denise McNeil's competency	Plaintiff's Exhibit 85; RICH 05120-05122
03/01/02	Letter from Susan Fitzgerald to Ruth L. Fuller of the University of Colorado Health Sciences Center regarding Denise McNeil and Dr. Fuller's Summary Report	Plaintiff's Exhibit 86; RICH 005110-05119
03/27/02	Letter from Susan Fitzgerald to Denise McNeil regarding Nextel Communications, Inc. and settlement check	Plaintiff's Exhibit 87; RICH 06572-06574
02/13/02	Letter from Gregory I. Rasin to Jeffrey Brown regarding Alencia Ashton Moore	Plaintiff's Exhibit 91; RICH 03856-03857; 020-0227-020-0228
03/11/02	Letter from Jeffrey Brown to Gregory I. Rasin regarding Completion of DRP	Plaintiff's Exhibit 92; RICH 05154; 345-3953
08/07/01	Unsigned letter from Bryan J. Mazzola of Leeds Morelli & Brown to Gregory I. Rasin regarding Nextel DRP	Plaintiff's Exhibit 93; RICH 04797; 102898
01/07/02	Letter from Bryan J. Mazzola to Victor Deverous regarding Alencia Ashton-Moore and Denise McNeil	Plaintiff's Exhibit 94; RICH 04926; 345-3757
01/04/02	Letter from Bryan J. Mazzola to Denise McNeil regarding McNeil v. Nextel Corporation	Plaintiff's Exhibit 95; RICH 04866-04869; 201210-201213
01/09/02	Letter from Bryan J. Mazzola to Alencia Ashton Moore regarding Nextel DRP	Plaintiff's Exhibit 96; RICH 04933; 020-0175
01/16/02	Email from Megan Bertron to Bryan Mazzola regarding Ashton-Moore Depositions	Plaintiff's Exhibit 97; RICH 04120; 020-0236
01/17/02	Letter from Bryan J. Mazzola to Denise McNeil regarding McNeil v. Nextel West Corporation	Plaintiff's Exhibit 98; RICH 06316-06317

01/17/02	Letter from Bryan J. Mazzola to James Hinga at JAMS regarding McNeil and Ashton-Moore Mediations	Plaintiff's Exhibit 99; RICH 04954; 345-3512
01/17/02	Letter from Bryan J. Mazzola to Ruth L. Fuller regarding Denise McNeil	Plaintiff's Exhibit 100; RICH 06326
01/22/02	Letter from Bryan J. Mazzola to David D. Powell, Jr. at Holland and Hart LLP regarding Denise McNeil Interrogatories	Plaintiff's Exhibit 101; RICH 04972; 345-3448
01/22/02	Letter from Bryan J. Mazzola to Alencia Ashton Moore regarding Nextel DRP	Plaintiff's Exhibit 102; RICH 06329
01/23/02	Letter from Bryan J. Mazzola to Denise McNeil regarding McNeil v. Nextel West Corporation	Plaintiff's Exhibit 103; RICH 06360-06361
01/31/02	Letter from Bryan J. Mazzola to David D. Powell, Jr. regarding Nextel DRP	Plaintiff's Exhibit 104; RICH 04996; 020-0270
02/07/02	Letter from Bryan J. Mazzola to Alencia Ashton Moore Ashton-Moore v. Nextel West Corporation	Plaintiff's Exhibit 105; RICH 05012-05013
02/13/02	Deposition of Alencia Ashton Moore	Plaintiff's Exhibit 106; RICH 05268-05274; 102543-102549
11/22/05	Deposition of Alencia Ashton-Moore, Volume II	
09/20/06	Deposition of James Vagnini	
09/15/06	Deposition of Susan Fitzgerald	
09/15/06	Deposition of Jeffrey K. Brown	
10/17/06	Deposition of Bryan Mazzola	
10/19/06	Deposition of Roy Simon	
11/16/05	Deposition of Alencia V. Ashton-Moore, Volume I	
09/19/06	Deposition of Rick Ostrove	
02/18/06	Deposition of Steven A. Morelli	
10/16/06	Deposition of Gregory Raisin	
09/19/06	Deposition of Lenard Leeds	
10/19/06	Deposition of John Buck	
09/15/06	Deposition of Lisa Marcus	
07/07/06	Deposition of Alencia Ashton-Moore	

09/05/06	Deposition of Kathleen Steffe	
09/05/06	Deposition of Dimitri Karpouzos	
09/06/06	Deposition of Nancy Nowell	
07/07/06	Deposition of Denise L. McNeil, Vol. II	
07/06/06	Deposition of Denise L. McNeil, Vol. I	
11/28/05	Defendants Leeds, Morelli & Brown, P.C., Lenard Leeds, Steven Morelli, Jeffrey Brown, James Vagnini and Bryan Mazzola's Expert Endorsement Pursuant to C.R.C.P. 26(a)(2)(b)	
06/12/06	Fourth Amended Complaint	
07/10/06	Answer of Defendant Nextel Communications, Inc. to Plaintiffs' Fourth Amended Complaint	
07/14/06	Lawyer Defendants' Answer to Fourth Amended Complaint	
07/10/06	Answer and Counterclaim	

ADDENDUM B

MICHAEL T. MIHM
Attorney at Law
STARRS MIHM & CASCHETTE LLP
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CO Denver County District Court 2nd JJD
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Filing ID: 13530211

Law Clerk: Ruth Daphne Teewaw

EMPLOYMENT

Partner, STARRS MIHM & CASCHETTE LLP, October 2003 to present. Civil trial practice including business and corporate litigation, fraud and business torts, legal malpractice, and personal injury and wrongful death.

Adjunct Faculty, University of Denver, Sturm College of Law, 2004 - 2006.

Lawyer, KENNEDY & CHRISTOPHER, P.C. f/k/a COOPER & KELLEY, P.C., Shareholder, January 1989 through September 2003; Associate, March 1985 through December 1988. Practice limited to civil litigation and trials, including business litigation, insurance litigation, legal malpractice, medical malpractice and wrongful death.

Associate, FRANDZEL & SHARE, Beverly Hills, California, December 1983 through February 1985. Banking litigation.

EDUCATION

University of Southern California Law School, Los Angeles, California, J.D., 1983.

Notes and Articles Editor, University of Southern California Major Tax Planning Journal, 1981-1983.

Member, Computer Law Journal, 1981-1983.

Walla Walla College, College Place, Washington, B.A., Religion (*cum laude*), 1980.

Trial Academy, International Association of Defense Counsel, Boulder, Colorado, July 1986.

ADMISSIONS

State Bar of California - 1983

U.S. District Court for the Northern and Central Districts of California - 1983

U.S. Court of Appeals, Ninth Circuit - 1983

State Bar of Colorado - 1985

- U.S. District Court for the District of Colorado - 1985
- U.S. Court of Appeals, Tenth Circuit - 1985
- U.S. Court of Appeals, Eleventh Circuit - 2003
- U.S. District Court for the Southern District of California - 2006

PUBLICATIONS

1. Managing Editor, *LAWYER'S PROFESSIONAL LIABILITY HANDBOOK*, Second Ed. (CLE in Colorado, Inc. 2005)
2. Author, Chapter 5, "Conflicts of Interest," in *LAWYER'S PROFESSIONAL LIABILITY HANDBOOK*, Second Ed. (CLE in Colorado, Inc. 2005)
3. Co-Author, with Blankenship, J., Chapter 28, "Common Law Legal Malpractice Claims by Clients," in *LAWYER'S PROFESSIONAL LIABILITY HANDBOOK*, Second Ed. (CLE in Colorado, Inc. 2005)
4. Co-Author, with Hyatt, E., Chapter 29, "Statutory Legal Malpractice Claims by Clients," in *LAWYER'S PROFESSIONAL LIABILITY HANDBOOK*, Second Ed. (CLE in Colorado, Inc. 2005)
5. Co-Author, with Blankenship, J., Chapter 30, "Liability to Third Parties," in *LAWYER'S PROFESSIONAL LIABILITY HANDBOOK*, Second Ed. (CLE in Colorado, Inc. 2005)
6. Co-Author, with Hyatt, E., Chapter 31, "Damages for Injuries or Losses Caused by Legal Malpractice," in *LAWYER'S PROFESSIONAL LIABILITY HANDBOOK*, Second Ed. (CLE in Colorado, Inc. 2005)
7. Co-Author, with Blankenship, J., Chapter 32, "Defenses to Legal Malpractice Claims," in *LAWYER'S PROFESSIONAL LIABILITY HANDBOOK*, Second Ed. (CLE in Colorado, Inc. 2005)
8. Author, "Finding Insurance for Your Professional Negligence Claim," in *Finding Insurance for Your Personal Injury Claim*, Colorado Trial Lawyers Association (2005)
9. Author, "Practice Management Software" in *OVERCOMING YOUR FEARS: USING TECHNOLOGY IN LIGATION*, National Business Institute, Inc., Denver, Colorado (2005)
10. Author, "Electronic Discovery" in *OVERCOMING YOUR FEARS: USING TECHNOLOGY IN LIGATION*, National Business Institute, Inc., Denver, Colorado (2005)
11. Co-author, with Ewing, M., "Advanced Trial Advocacy," National Business Institute, Inc. (2004)
12. Co-author, with Brown, D., "Damages in Colorado Civil Trial Practice," National Business Institute, Inc. (2002)

13. Author, "Successfully Presenting the Complex Case to a Colorado Jury," National Business Institute, Inc. (2001)
14. Co-author, with Dolan, L., Chapter 6, "Legal Bases for Lawyers' Liability for Malpractice," COLORADO ATTORNEY'S PROFESSIONAL LIABILITY HANDBOOK (Robin L. Beatty, ed., CLE in Colorado, Inc.,1999)
15. Co-author, with Dolan, L.,Chapter 7, "Common Law Legal Malpractice Claims," COLORADO ATTORNEY'S PROFESSIONAL LIABILITY HANDBOOK (Robin L. Beatty, ed., CLE in Colorado, Inc.,1999)
16. Co-author, with Dolan, L., Chapter 8, "Statutory Legal Malpractice Claims," COLORADO ATTORNEY'S PROFESSIONAL LIABILITY HANDBOOK (Robin L. Beatty, ed., CLE in Colorado, Inc.,1999)
17. Co-author, with Dolan, L., Chapter 9, "Liability to Third Parties," COLORADO ATTORNEY'S PROFESSIONAL LIABILITY HANDBOOK (Robin L. Beatty, ed., CLE in Colorado, Inc.,1999)
18. Co-author, with Dolan, L., Chapter 10, "Conflicts of Interest," COLORADO ATTORNEY'S PROFESSIONAL LIABILITY HANDBOOK (Robin L. Beatty, ed., CLE in Colorado, Inc.,1999)
19. Co-author, with Dolan, L., Chapter 11, "Damages for Injuries or Losses Caused by Legal Malpractice," COLORADO ATTORNEY'S PROFESSIONAL LIABILITY HANDBOOK (Robin L. Beatty, ed., CLE in Colorado, Inc.,1999)
20. Co-author, with Dolan, L., Chapter 12, "Defenses to Legal Malpractice Claims," COLORADO ATTORNEY'S PROFESSIONAL LIABILITY HANDBOOK (Robin L. Beatty, ed., Colorado Bar Association/CLE in Colorado, Inc.,1999)
21. Author, "Risks of Multi-State Practice of Law," WHOOPS: COLORADO BAR ASSOCIATION MALPRACTICE PREVENTION NEWS, April, 1999
22. Author, "Software Piracy and the Personal Computer: Is the 1980 Software Copyright Act Effective?," IV COMPUTER LAW JOURNAL 1971 (1983)

MODERATOR OR SPEAKER

1. Co-Chair and Moderator, 2006 Preventing Legal Malpractice Seminars, Colorado Bar Association (January - February 2006)
2. Speaker, "Finding Insurance for Your Professional Negligence Claim," in Finding Insurance for Your Personal Injury Seminar, Colorado Trial Lawyers Association, Denver, Colorado (April 2005)

3. Speaker, "Practice Management Software" and "Electronic Discovery" in "Overcoming Your Fears: Using Technology in Litigation Seminar," National Business Institute, Inc., Denver, Colorado (March 2005)
4. Speaker and Moderator, "Advanced Trial Advocacy Seminar," with Ewing, M., National Business Institute, Inc., Denver, Colorado (July 2004)
5. Speaker and Moderator, "Damages in Colorado Civil Trial Practice," with Brown, D., National Business Institute, Inc., Denver, Colorado (March 2003)
6. Speaker and Moderator, "Damages in Colorado Civil Trial Practice," with Brown, D., National Business Institute, Inc., Lakewood, Colorado (January 2002)
7. Speaker, "Hiring and Firing Clients," Tuesdays at the Bar, Colorado Bar Association (February 2001)
8. Speaker, "Successfully Presenting the Complex Case to a Colorado Jury," with Burg, M., National Business Institute, Inc., Denver, Colorado (January 2001)
9. Speaker, "Restatement (Third) of Law Governing Lawyers: Malpractice Highlights and New Directions," Colorado Bar Association Convention, Vail Colorado, (September 1999)
10. Speaker, "Recent Developments in Professional Liability Cases," 1999 Legal Malpractice Seminars, Colorado Bar Association and CBA/CLE in Colorado, Inc., (Jan-Feb, 1999)
11. Speaker, "Preventing Legal Malpractice," Boulder County Bar Association (December 1997)
12. Speaker, "Fee Agreements and Client Communication," 1997 Legal Malpractice Seminars, Colorado Bar Association and CBA/CLE in Colorado, Inc., (January 1997)
13. Speaker, "Legal Malpractice: Trends and Prevention," Weld County Bar Association (November 1996)
14. Speaker, with Breakstone, D., "Lawyer Liability Under the Restatement (Third) of Law Governing Lawyers," Colorado Bar Association Convention, Vail, Colorado (September 1996)
15. Program Chair and Moderator, 1996 Legal Malpractice Prevention Seminars, Colorado Bar Association and CBA/CLE in Colorado, Inc., (January-February 1996)
16. Speaker, "How to Terminate the Attorney-Client Relationship Without Getting Sued," 1995 Legal Malpractice Prevention Seminars, Colorado Bar Association and CBA/CLE in Colorado, Inc., Fort Collins, Colorado (February 1995)

17. Program Chair and Speaker, "Malpractice Prevention: Detecting and Handling Conflicts of Interest Issues in a General Practice." Colorado Bar Association Convention, Keystone, Colorado (September 1994)
18. Speaker, with Tucker, H., "Malpractice Prevention Tips for Elder Law Attorneys," 1994 Elder Law Seminar, CBA/CLE in Colorado, Inc., (June 1994)

ORGANIZATIONS

American Bar Association, 1983 to present

Litigation Section:

Business Torts Committee (Co-Editor, Committee Website, 2005-present)

Torts and Insurance Practice Section:

Intellectual Property Section

Law Practice Management Section

Colorado Bar Association, 1985 to present

Professional Liability Committee, Chair, 1997-1999

Litigation Section

California Bar Association, 1983 to present

Litigation Section

Denver Bar Association

Los Angeles County Bar Association

American Association for Justice (formerly Association of Trial Lawyers of America)

Business Torts Section

Professional Negligence Section

Colorado Trial Lawyers Association

Commercial Litigation Committee

PERSONAL

Born 1956 in Paw Paw, Michigan. Married; two children.

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